

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

FRANCIS S. MESTETH,

Petitioner,

vs.

ROBERT HOUSTON,¹

Respondent.

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4:07cv3096

ORDER on INITIAL REVIEW

This matter is before the court for initial review of the Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 ("§ 2254 petition") filed by the petitioner, Francis S. Mesteth, a prisoner in the custody of the Nebraska Department of Correctional Services. 28 U.S.C. § 2254 affords habeas corpus relief to "a person in custody pursuant to the judgment of a State court [who] is in custody in violation of the Constitution or laws ... of the United States." *Id.* § 2254(a). Rule 4 of the *Rules Governing Section 2254 proceedings in the United States District Courts* (eff. 12/1/04) states:

The clerk must promptly forward the petition to a judge under the court's assignment procedure, and the judge must promptly examine it. If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner. If the petition is not dismissed, the judge must order the respondent to file an answer, motion, or other response within a fixed time, or to take other action the judge may order. In every case, the clerk must serve a copy of the petition and any order on the respondent and on the attorney general or other appropriate officer of the state involved.

The petitioner alleges violations of his constitutional rights in connection with his conviction for "failure to appear and driving under the influence" (filing no. 1 at 1) in the District Court of Sheridan County, Nebraska, on or about November 19, 2002. Among other claims, the petitioner states that he was sentenced on a dismissed charge; his trial attorney abandoned him after sentencing and failed to file an appeal; and he is an uneducated Native American who requested appointment of counsel, but his request was denied.

¹The court substitutes Robert Houston, Director of the Nebraska Department of Correctional Services, as the plaintiff's custodian. The Clerk of Court shall modify the court's records accordingly.

On initial review of the § 2254 petition, I find that summary dismissal under Rule 4 of the § 2254 *Rules* is not required, and that the respondent shall answer or otherwise respond to the § 2254 petition.

IT IS THEREFORE ORDERED:

1. That the Clerk of Court shall mail copies of the § 2254 petition to the respondent and to the Nebraska Attorney General by regular first-class mail; the Clerk shall modify the court's records to substitute Robert Houston as the respondent;

2. That within thirty (30) days of the date of this Order, the respondent shall file an Answer to the § 2254 petition on the merits of the claims and any affirmative defenses, in the manner contemplated by Rule 5 of the § 2254 *Rules*, or the respondent may, in his discretion, limit his response to affirmative defense(s) by filing a motion for summary judgment pursuant to Fed. R. Civ. P. 56(b);

3. That, whether the respondent files an answer or a motion for summary judgment, the respondent shall also file with the court and serve on the petitioner a pleading entitled Designation of Relevant State Court Records;

4. That all records listed in the respondent's Designation of Relevant State Court Records shall be filed with, or delivered to, the court at the time the Designation of Relevant State Court Records is filed;

5. That if the respondent elects to file a motion for summary judgment, copies of all records designated and filed in support of the motion shall also be served on the petitioner;

6. That, whether the respondent files an answer or a motion for summary judgment, the petitioner may reply within thirty (30) days thereafter; and

7. That, if requested in writing, each party shall be entitled to an extension of time.

DATED this 16th day of April, 2007.

BY THE COURT:

s/ Warren K. Urbom
United States Senior District Judge